U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of	:	
	:	
EDWARD C. WEST,	:	
Claimant,	:	**Case Nos.: 1986-LHC-1016**
	:	**1998-LHC-1222**
v.	:	
	:	
NEWPORT NEWS SHIPBUILDING,[1]	:	**OWCP Nos.: 05-32391**
Employer, and	:	**05-69456[2]**
	:	
DIRECTOR, OFFICE OF WORKERS'	:	
COMPENSATION PROGRAMS,	:	
Party-in-Interest.	:	
	:	

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James M. Mesnard, Esq., Seyfarth, Shaw, Fairweather & Geraldson, Washington, D.C., for the Employer Newport News Shipbuilding ("Employer")

BEFORE: PAMELA LAKES WOOD
Administrative Law Judge

DECISION AND ORDER ON REMAND AND ON MODIFICATION

The instant claim arises under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, ***et seq.*** ("the Act") and the regulations issued thereunder. There

[1] At the hearing, Counsel for the Employer advised that the company formerly known as "Newport News Shipbuilding and Dry Dock" is now known as "Newport News Shipbuilding." (Tr. 4-5). As used herein, "Employer" references either entity.

[2] The OWCP number for Case No. 1986-LHC-1016 (the case on remand) is "5-32391" and the OWCP number for Case No. 1998-LHC-1222 (the modification petition) is "5-69456." The listing of OWCP No. "5-43604" on some documents appears to be in error.

have been extended proceedings over the past decade, and the instant case involves two consolidated matters: (1) a remand from the Benefits Review Board ("Board" or "BRB"), pursuant to its Decision and Order of June 5, 1998, which vacated the May 6, 1997 Decision and Order on Reconsideration of the undersigned administrative law judge and (2) a request for modification of the existing award of benefits. Both matters were tried before the undersigned on May 19, 1999 in Newport News Virginia.

At the May 19, 1999 Hearing, Claimant's Exhibits 1 through 17 ("CX 1" through "CX 17") and Employer's Exhibits 1 through 46 ("EX 1" through "EX 46") were admitted into evidence. (Transcript of May 19, 1999 Hearing ["Tr."] at 11-23). There were two witnesses: Claimant Edward C. West (Tr. 39 - 74) and Employer's foreman William Lee ("Bill") Routen (Tr. 75 - 90). The exhibits from the previous (October 28, 1986) hearing before Judge Lawrence were missing and the record was otherwise incomplete, so the parties have done their best to reconstruct the record. Although the exhibits admitted into evidence before me (CX 1 through 17 and EX 1 through 46) are not numbered identically to the original hearing, it appears that the parties have been able to submit copies of the pertinent documents and I will be using the exhibit numbers for the May 19, 1999 hearing. (Tr. 5-11). The transcript of the October 28, 1996 hearing is of record (CX 16), as is that of the May 19, 1999 hearing.

Procedural History and Summary of Issues

Edward C. West ("Claimant") now receives permanent partial disability benefits based upon injuries he sustained on or about January 21, 1983, when he was employed as a second-shift welding machine repairman for Employer Newport News Shipbuilding and Dry Dock Company, now known as Newport News Shipbuilding ("Employer"). Claimant returned to work with Employer on July 12, 1983 in a light-duty capacity, and was transferred to his current position as a drawing clerk on May 13, 1985.

The first hearing in this matter was held on October 28, 1986 before Judge Glenn Robert Lawrence, who issued the first Decision and Order, dated June 24, 1987 (CX 15, EX 26)[3] in this case. That Decision awarded Claimant $99.00 per week in compensation for permanent partial disability from June 1, 1984.[4] In making this determination, Judge

[3] Some exhibits are duplicative.

[4] This figure was calculated based upon a post-injury wage earning capacity of $286.40 per week (base pay) (computed from $7.16 per hour – his current hourly wage adjusted to 1983 wage levels – times 40 hours) subtracted from the stipulated average weekly wage of $435.72, which resulted in permanent partial disability of $149.32 (rounded to $149.00) weekly, with a corresponding compensation rate of $99.32 (or $99.55 weekly based upon 2/3 of the exact amount), which was in turn rounded to $99.00. No allowance for overtime or the shift differential was made.

Lawrence rejected Employer's argument that Claimant suffered no economic loss because he was making more than his average weekly wage on the date of injury, because "the additional sum includes [a] shift differential based on the employee[']s extraordinary effort" which "should not be considered in establishing after injury earnings." (EX 26).

Following an appeal by the Employer to the Benefits Review Board, the Board vacated the decision as to wage-earning capacity, agreed with the Employer that Judge Lawrence had erred in not considering evidence of "claimant's post-injury overtime earnings, shift differential and merit increase," and remanded the case on October 30, 1989 (EX 27) for a determination whether the Claimant's wage-earning capacity was reasonably and fairly represented by his actual post-injury wages (including overtime wages, a second shift wage differential, and merit wage increases).

In his second decision in this case, the Decision and Order of November 18, 1993 (EX 28, CX 13),[5] Judge Lawrence noted that Claimant had been regularly and continuously employed, suitable to his age and education, and found that Claimant's actual post-injury wages represented his wage-earning capacity. Judge Lawrence further found that pain did not prevent Claimant from performing his job as a drawing clerk regularly and continuously and from working substantial overtime; determined that Claimant's wage-earning capacity exceeded his average weekly wages;[6] and therefore denied Claimant's request for permanent partial disability compensation. (EX 28).

Claimant filed a motion for reconsideration, following which Judge Lawrence issued a third Decision and Order [on Motion for Reconsideration] of February 3, 1994 (EX 29; CX 12).[7] In that decision, Judge Lawrence found that, despite back pain, Claimant was required to work more overtime after his injury than he had prior to his injury (11 hours as

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[5] Employer's Exhibit 28, a copy of Judge Lawrence's November 18, 1993 Decision and Order, is missing page 3. A complete copy of that decision appears as Claimant's Exhibit 13.

[6] In making this determination, Judge Lawrence noted that the claimant had worked 843.7 [initially incorrectly listed as 826] hours of overtime in 1986, of which 607 was voluntary [representing 11 hours per week], and 326 hours in 1985 (listed in EX 41 & CX 4). In assessing the Claimant's wage earning capacity, he included 11 hours of overtime based upon the maximum amount of overtime Claimant had been able to work on a voluntary basis, even though he found a cumulative average of overtime of only 275 per year, or 5.3 hours per week. (CX 13).

[7] Employer's Exhibit 29, a signed copy of Judge Lawrence's February 3, 1994 decision, does not include page 6 of that 8-page decision (which has unnumbered pages). A complete copy with service sheet appears as Claimant's Exhibit 12 (CX 12).

compared with 3.8 hours)[8] in an effort to maintain his pre-injury wages and held that this additional amount of overtime should not be considered when computing post-injury wage-earning capacity, but that the 3.8 hours that he would have worked anyway should be included.[9] He further held that it would not be fair or reasonable to include the $0.47 shift differential in Claimant's post-injury wage-earning capacity, since the Employer removed the Claimant from the second shift (in March 1992). Judge Lawrence included the $0.21 merit increase in Claimant's post-injury wage-earning capacity, but not the $0.40 [should be $0.34, ***see*** EX 24] merit pay increase, since it had not been earned at the time of hearing. Thus, the loss in wage-earning capacity was calculated as $98.89 (subtracting his post-injury wage-earning capacity of $336.83 from his pre-injury average weekly wage of $435.72).[10]

Employer filed a Motion for Reconsideration[11] on February 14, 1994, which was referred to the undersigned administrative law judge due to Judge Lawrence's retirement, leading to the fourth decision in the instant case, my Decision and Order on Reconsideration of May 6, 1997 (EX 30). In that decision, I found, as did Judge Lawrence, that the Claimant's actual post-injury wages did not fairly and reasonably represent Claimant's post-injury wage-earning capacity and I determined that Claimant's post-injury

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[8] In his 1994 Decision, Judge Lawrence noted that Claimant's overtime hours of 326 in 1985 and 843.7 in 1986 were not representative of the overtime he worked subsequently, as he did not work more than 86 overtime hours in any year since 1990. (EX 29; CX 12).

[9] In his 1994 decision, citing Employer's Remand Exhibit E 2 (now EX 25 and CX 4 p.4) Judge Lawrence noted that overtime was included in Claimant's pre-injury wages, and to compute the hours of overtime, he took the $435.72 pre-injury average weekly wage and subtracted $381.20 (for 40 "regular" hours at the $9.53 hourly rate), resulting in overtime of $54.30. He assumed that the overtime rate was $14.30 hourly, based upon the assumption that overtime was paid at a time-and-one-half rate, and determined that the pre-injury average weekly wage included 3.8 hours of overtime. Claimant's overtime wages in 1983 shown on EX 25 reflect that he received $228.73 for 16 hours of overtime, which would also result in an overtime rate of $14.30, or 1 1/2 times the hourly rate of $9.53. (EX 29; CX 12).

[10] Claimant's post-injury wage-earning capacity was set at $336.83, based on 40 hours per week, at $7.16 per hour base wage (based upon the stipulated wages for a drawing clerk job at the time of the injury), plus $0.21 merit pay increase, and 3.8 hours of overtime at $11.06 per hour. In contrast, his pre-injury stipulated average weekly wage of $435.72 consisted regular pay of $381.20 per week, assuming a basic wage rate of $9.53 per hour, plus $54.52, which is attributable to overtime and/or the shift differential. See footnotes 9 and 16.

[11] In its Motion for Reconsideration, Employer argued that Judge Lawrence erred in his 1994 decision, by 1) refusing to include the second merit increase in Claimant's post-injury wage-earning capacity; 2) failing to include the $0.47 wage differential for working the second shift in the Claimant's wage-earning capacity; and 3) considering a loss of overtime as a basis for awarding compensation.

wage-earning capacity should include both merit increases, the second shift differential, and no overtime.[12] Based upon a post-injury wage-earning capacity of $329.60 per week, deducted from Claimant's pre-injury average weekly wage of $435.72, the loss in earning capacity was $106.12 per week, with a corresponding compensation rate of $70.75.

Employer appealed and Claimant cross-appealed. While the case was pending before the Board, the Employer filed a modification petition dated August 21, 1997, seeking to modify my Decision and Order on Reconsideration. Employer argued that the Claimant had worked an average of 5.2 hours overtime per week from May 1985 until May 1997 and that my exclusion of overtime as speculative was in error. The prehearing statements relating to that petition were referred for a hearing on March 11, 1998, with the listed issues of section 22 modification and extent of disability (if any).

The Board's Decision and Order of June 5, 1998 (EX 31), vacated my Decision and Order on Reconsideration of May 6, 1997 and remanded for further consideration of the Claimant's post-injury wage-earning capacity. The Board found that I should not have excluded overtime earnings in my calculation of Claimant's post-injury wage-earning capacity based upon my finding that it was speculative; that I should not have excluded all of the overtime based upon the theory that it was required to maintain pre-injury wages; that I should not have included the shift differential for the entire period but should have taken the Claimant's actual experience into account and calculated two post-injury wage-earning capacities, one of which included the shift differential and the other of which did not; that although I was correct in including the first merit increase, I should not have included the second one, as it was not payable until December 17, 1990; and that in calculating the merit increase portion of the Claimant's wage earning capacity, I should have taken inflation into account. Thus, the only issue on remand involves an assessment and calculation of the Claimant's wage earning capacity.

Both the remand decision and the modification petition were referred to the undersigned administrative law judge for disposition and were consolidated, along with a pending petition for attorney fees. As noted above, a hearing was held before the undersigned on May 19, 1999 in Newport News, Virginia.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Facts

Stipulations.

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[12] In my 1997 decision, I found that the stipulated base salary of $7.16 per hour should be increased by both merit pay increases of $0.21 and $0.40 [should be $.034] per hour and by the $0.47 shift differential, to yield an hourly wage of $8.24 and weekly wages of $329.60.

The following stipulations (citations omitted, but discussed at the October 28, 1986 hearing, CX 16 at pages 5 to 19) are stated in Judge Lawrence's November 18, 1993 Decision and Order (CX 13 at pp. 1 to 2), which is incorporated by reference herein:

1. The parties are subject to the Act.

2. The parties were in an employer-employee relationship.

3. The Claimant sustained a work-related back injury on September 22, 1980.[13]

4. The average weekly wage for September 22, 1980 was $377.53 and for January 1983 was $435.72.

5. Timely claims, notices of controversion, first reports of injury, and notices of final payment were filed.

6. The Employer voluntarily paid to the Claimant compensation for temporary total disability between September 23, 1980 and January 4, 1981; November 19, 1981 and December 6, 1982; January 26, 1983 and July 4, 1983; October 14, 1983 and October 30, 1983; and between May 6, 1986 and May 11, 1986 at the compensation rate of $251.70 per week, totaling $10,997.00.

7. The Employer voluntarily paid for temporary partial disability between May 13, 1985 and July 21, 1985 at a compensation rate of $91.42 per week, totaling $914.20.

8. The Employer voluntarily paid for permanent partial disability between July 22, 1985 and May 5, 1986, and continuously since May 12, 1986 at the rate of $78.89 weekly.

9. The Employer voluntarily compensated the Claimant for all medical services.

10. The Claimant was engaged in regular and continuous employment.

11. Since May 13, 1985, the Claimant worked as a drawing clerk.

12. Between July 11, 1983 and May 13, 1985, the Claimant worked primarily as a materials clerk. Although he was assigned to the Material Reclamation Assembly (MRA) Shop, he did not work there.

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[13] At the initial hearing, the Employer withdrew its contention that the January 1983 injury was merely an aggravation of the September 1980 injury, and Employer conceded that the Claimant suffered an injury in 1983 that caused disc herniation. However, Employer would not stipulate that the January 1983 injury arose out of and in the course of Claimant's employment with the Employer. (CX 26 at p. 6-8).

13. The Claimant's base wage rate on May 15, 1985 was $7.16 per hour when adjusted to the date of injury.

14. The Claimant's base wage rate on July 22, 1985 including his night shift differential[14] was $7.63 per hour when adjusted to the date of injury.

15. The Claimant's actual base wage rate at present [i.e., as of October 1986] is $7.84 per hour [including a merit pay increase, adjusted back to the date of injury].[15]

The stipulations were stated slightly differently in Judge Lawrence's Decision and Order on Motion for Reconsideration of February 3, 1994 (CX 12 at pp. 2 to 3):

1. Jurisdiction is proper under the Act.

2. The parties were in an employer/employee relationship during all pertinent times.

3. The Claimant gave timely notice of his January 1983 injury and made a timely claim for compensation.

4. The Employer filed multiple Employer's First Report of Injury forms on October 13, 1980 (for Claimant's injury of September 1980), August 21, 1985, and October 30, 1985.

5. The Employer filed Notices of Controversion on May 17, 1982, August 12, 1982, October 15, 1984, November 1, 1984, August 21, 1985, and October 8, 1985.

6. The Employer made voluntary payments of compensation as reflected in Claimant's Exhibit 9 [now EX 1].

7. The Employer has paid for all necessary medical services as a result of the 1980 and 1983 injuries.

8. The Claimant suffered an injury in January 1983, resulting in a disc herniation.

9. The Claimant's average weekly wage for the injury of January 1983 was $435.72, which yields a compensation rate of $290.48 per week.

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[14] The parties agreed that about two months after Claimant's transfer to the drawing clerk position, on July 22, 1985, he was put on the second (night) shift. (CX 16 at 18-19).

[15] See the Transcript of the October 28, 1986 Hearing, CX 16, at pages 18-19.

10. The Claimant's current position as a drawing clerk paid $7.16 per hour at the time of the January 1983 injury; a transfer to a second shift drawing clerk would result in an increase of $.47 per hour; at the time of the hearing, the Claimant had received a merit increase which, in 1983, would have resulted in an hourly wage rate of $7.84 (including the $.47 per hour second shift differential.)

At the hearing before me, the parties agreed that the stipulations were still in existence (apparently a reference to those listed in the 1994 Decision) and have not sought to have them set aside. (Tr. 37-38).

Judge Lawrence's Initial Decision and Order

Judge Lawrence's findings on wage earning capacity were vacated by the Board in its October 30, 1989 Decision and Order, but his other factual findings were not challenged on appeal. Specifically, in his June 24, 1987 Decision and Order, Judge Lawrence found, ***inter alia***, that Claimant suffered a new back injury at work in the nature of disc herniation necessitating back surgery, while in the course of employment; that he reached maximum medical improvement as of May 31, 1984; and that the Employer qualified for section 8(f) relief (33 U.S.C. § 908(f)). Judge Lawrence also stated that the Claimant's position as drawing clerk reflected "a seven step decrease in the pay scale from his prior job as second record call specialist in production work ... or a drop from $11.74 an hour to $8.64 an hour" (plus the $.47 shift wage differential after July 22, 1985). (EX 26 at pp. 2 to 4).

Claimant's Testimony

At the time of the hearing before me, Claimant was 54 years of age. (Tr. 56). He testified that he was currently employed by Newport News Shipbuilding and that he would have worked for the Shipyard for 30 years as of September 15, 1999. (Tr. 40, 56-57). At the time of the hearing, he was employed as a drawing clerk and he had been employed in that capacity since 1985. (Tr. 40). Claimant testified that he had previously repaired welding equipment, although his job classification was "toolkeeper," until 1983. (Tr. 40-41). At that time, he was underneath a submarine changing an automatic welding machine, with only about two feet of clearance, and he ruptured a disc. (Tr. 41). He recalled that the accident date was January 21 or 23 of 1983. (Tr. 71). He sought medical treatment from Dr. Rinaldi, and he is now being treated by Dr. Rinaldi's associate, Dr. Peach. (Tr. 41-42). He testified that Dr. Rinaldi did not want him to go back to work, but the shipyard more or less demanded that he return. (Tr. 42). After about three months he was put to work in what he characterized as "an old folks home," where he sat at a table and washed hardhats and ear muffs. (Tr. 42-43). On cross examination, he agreed that the facility where he worked was known as the materials reclamation and assembly (MRA) shop. (Tr. 69). He requested a transfer and was told that he could work in a materials shack on one of the aircraft carriers. (Tr. 41). He worked at that job every day for two

years, passing out materials and supplies. (Tr. 43-44). After his "two years of maximum recovery was up," he was interviewed by the X32 department, sheet metal department, for the position of drawing clerk, and he stated that he was "forced into taking that job." (Tr. 44).

At the time of the hearing, Claimant's base rate of pay was $11.42 per hour. (Tr. 44). His best estimate was that his toolkeeper rate of pay was $11.30 or $11.40 back in 1983, and he would now be making a minimum of $14.50 if he had stayed in the toolkeeper position.[16] (Tr. 45). He was "on the verge" of receiving the top of the union pay scale in 1983, as a first-class specialist, if he could prove to his supervisor that he could take care of the submarines. (Tr. 46-47). Claimant testified that he worked a lot of overtime as a toolkeeper and that he worked the second shift. (Tr. 47-48).

When he was transferred after his injury, he was placed on the first shift and he was not paid the 47 cent per hour shift differential. (Tr. 47- 48). However, he talked a coworker (Watson) into switching shifts with him in the latter part of 1985, about six months after he was switched to the position of drawing clerk. (Tr. 48-49). On cross examination, he agreed that the date of the switch was July 22, 1985, as he stated at the previous hearing. (Tr. 57-58). He stayed on that shift until soon after 1990, when the Enterprise came in for an overhaul, when his whole department on the second shift went to first shift. (Tr. 50). On cross examination, he did not dispute that the time when he switched to the first shift was March 1992. [17] (Tr. 58). That switch was not voluntary, and he repeatedly tried to be transferred back to the second shift. (Tr. 50-51). After two years or so, after he was transferred out of the production departments into the reproduction department (014), he was given his requested transfer to the second shift. (Tr. 51-52). On cross examination, he agreed that he was transferred back to the second shift on May 9, 1996. (Tr. 59; ***see also*** EX 39). He "worked second for quite a while" and then volunteered for third; both second and third shifts had the same pay and the same extra wage differential. (Tr. 52). At the time of the hearing, Claimant was on the third shift. (Tr. 51). Claimant agreed he has consistently earned the 47-cent differential since May 9, 1996. (Tr. 59). He has consistently volunteered to work second shift since he has been in the Shipyard, because of the 47-cent night differential, and he has worked second shift about 90 per cent of the 30

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[16] Employer's Exhibit 24 lists the following wage rates for Claimant as toolkeeper (Dept. 032) (including the two-year post-injury period): 8.73 as of 8/16/82; 9.03 effective ("eff.") 8/16/82; 9.53 eff.10/05/82; 9.63 eff. 4/12/83; 10.50 eff. 11/2/83; and 11.24 eff. 3/5/85. Claimant's wage rates as drawing clerk (Dept. X32) are listed as: 8.46 eff. 5/13/85; 9.05 eff. 5/06/86; 9.32 eff. 10/20/86; 9.60 eff. 2/06/90; 9.94 eff. 12/17/90; 9.96 eff. 4/01/91; 10.46 eff. 8/03/92; and 10.88 also eff. 8/03/92. (EX 24). An update appearing as EX 44 lists Claimant's wage rates as drawing clerk (Dept. 014) as 10.88 eff. 8/16/93 and 11.42 eff. 12/06/93. (EX 44). His rate of pay was still $11.42 per hour on May 9, 1996, according to the memorandum of the same date reflecting his receipt of the night shift differential of $.47 more per hour (or $11.89 total). (EX 39).

[17] The transcript of Claimant's May 4, 1999 deposition appears as EX 45.

years that he has worked there. (Tr. 52). That shift differential did not, however, make up all of the loss of pay for his transfer to drawing clerk, with a wage of $8.50, as he was cut back $2.89 per hour.[18] (Tr. 53).

Claimant testified that he has had an opportunity to work overtime since the injury and on one occasion (in 1986) was required to work mandatory overtime. (Tr. 53). When asked whether in 1986 he worked 843 hours of overtime, he indicated that amount "sound[ed] right." (Tr. 53). Claimant testified that all of his other overtime has been voluntary, and he worked overtime prior to his injury. (Tr. 54). Although he initially worked overtime to support a nonworking wife and four children, he now works overtime to make up for the difference in the money he lost, just to keep his "head above the water." (Tr. 54-55). On cross examination, he admitted to having to pay alimony of $350.00 monthly since 1996. (Tr. 60-61, 71). On redirect he indicated that he did not get divorced until May 29, 1998, but he was separated from his wife for two years before that. (Tr. 70). He testified he has worked over 40 hours weekly against the 1996 advice of his treating physicians, Drs. Peach and Rinaldi, in order to pay his bills. (Tr. 55). Claimant testified that although he has always worked overtime, there was more overtime available prior to his injury, and toolkeepers have more available overtime work (as compared with drawing clerks) because they are assigned to the whole Shipyard. (Tr. 56, 72-74). On cross examination, he admitted that the amount of overtime available to toolkeepers in 1999 would not necessarily be the same as that available in 1983, when he did repair work as a toolkeeper; however, he maintained that more overtime would be available as a toolkeeper, based upon information he learned from coworkers (such as Baize and Thornton, whom he last saw two years ago and last year, respectively). (Tr. 62-64, 72-74). On redirect, he indicated that the job of toolkeeper was now essentially the same as when he was so employed. (Tr. 72).

Claimant also admitted to a minor car accident and a fall from a ladder (which resulted in a broken rib) [in 1996]. (Tr. 64-66). Although he only recalled being out of work for three weeks for the automobile accident, he did not dispute that Dr. Guardia excused him from work from January 13 to March 28 due to cervical sprain syndrome. (Tr. 65). He was treated by Dr. Evans [for the fall], and he did not dispute that he was out from September 13, 1996 through December 2, 1996. (Tr. 66-67). He conceded that he could not work overtime in 1996 when he was out with the car accident and when he was out due to the fall. (Tr. 66, 67). However, he admitted that he was able to work 173.2 hours of overtime that year anyway. (Tr. 67). Claimant also admitted that he was out of work for a period of time in 1993 (approximately 90 days, although he did not dispute that 78 days was correct) due to a heart problem. (Tr. 67-68).

Claimant testified that since his injury, he has only had two merit increases – the

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[18] The actual pay cut was $2.78 per hour, from a base rate of $11.24 to $8.46. (EX 24, EX 44). See footnote 16 above.

one in 1986 and the one in 1990. (Tr. 68).

Upon questioning by the undersigned, Claimant verified that he was in pain as a result of his back injury. (Tr. 69). He indicated that it bothers him constantly, and it bothers him "a lot" if he stays in one position too long or if he lifts too much. (Tr. 69-70). Sometimes it bothers him for no reason, which is what the doctor says is a flare up, and it also bothers him when he sleeps more than three or four hours, as he has to get up every two or three hours to move around. (Tr. 69-70). When asked whether it got worse or stayed the same when he worked overtime, Claimant testified:

> Sometimes it does not get worse. It has gotten worse. I know when I was working in '86, that mandatory overtime, my wife had to bring me to the gate and drop me off, and she had to come to the gate and pick me up, because we had to park so far away from the gate I wasn't able to walk, so she dropped me off at the gate and picked me up at the gate every day. We were working – I think it was like 7:00 to 7:00, 12 hours a day, and she – her and my son would bring me to work and pick me up, because I couldn't walk to my car, it was so far away.

(Tr. 70).

Testimony of William Lee ["Bill"] Routen

William Lee Routen ("Routen") indicated that he was employed as a foreman with Newport News Shipbuilding and that he has been at Newport News for thirty years. (Tr. 75). Routen indicated that he had two departments (X36 and O14) under him, that he worked on the third shift, that he supervised Claimant Edward West, who worked under the vault services (O14), and that he has been the Claimant's supervisor since he started on the third shift on June 10, 1998, after 29 years on the day shift. (Tr. 75, 82-83). He did not know Claimant prior to supervising him. (Tr. 86). Routen further testified that Claimant has a desk job, and that "when the trades [came] in," he was required to issue the documents (such as drawings or blueprints) requested and log in documents that were being received. (Tr. 76-77). He basically sits at his desk except when he needs to go into the other room to issue a drawing for someone coming in. (Tr. 76-77). The job allows Claimant to get up and change position as he needs, and to take smoking and bathroom breaks. (Tr. 76-77). Although in 1998 there were four clerks, at the time of the hearing there were only three on his shift, and due to the departure of the aircraft carrier Truman, they were down to one ship, the Nimitz. (Tr. 77-78).

Routen rotates the positions among the drawing clerks and also rotates the overtime among the clerks, with each of the clerks offered overtime once every three weeks (Tr. 77-78). Overtime is usually on Saturdays or Sundays, with Saturdays payable at time and one half the regular rate (including the shift differential) for the first eight hours

and Sundays payable at double time. (Tr. 78). Routen testified that he used to work in X19 with the toolkeepers, where Claimant originally worked, but that the section has broken down. (Tr. 79-81). He testified that overtime is not as available now as it was when Claimant worked there, and that Claimant is "probably getting as much overtime now as anybody," including the toolkeepers. (Tr. 80-81). Routen testified that Claimant usually works overtime when it is offered but that he has turned it down in the past. (Tr. 81). Claimant has not complained to Routen about physical problems when he works overtime. (Tr. 81). On cross examination, he admitted that he had only been Claimant's supervisor for 11 months as of the time of the hearing and would not know whether he had complaints prior to that time, and he admitted that Claimant was not talkative. (Tr. 83). Overtime varies from year to year based upon workload, and the more ships they get out, the less overtime there is. (Tr. 82, 88). However, although his shift is small in number, the operation of 014 is a "necessary evil," because someone has to be around to provide drawings. (Tr. 82). Since he started on June 10, 1998, "the only down weekends" that they have had (or had off) were "Thanksgiving and the Christmas shutdown." (Tr. 82).

On cross examination, Routen indicated that 014 was created relatively recently, in approximately 1995, although the same work was being done under a different designation, and that prior to 1995, the drawing clerks were split up into the production departments and assigned to whatever ship was being worked on at that time. (Tr. 84-85, 87, 89). Routen testified that he worked a lot of overtime right now, that he was part of management, and that he had been part of management for about 16 years. (Tr. 85-86). On redirect, he indicated that overtime is cyclic, and that in 15 years there would be two or three cycles, particularly on the carriers. (Tr. 88). Most of the current work is on the carriers, both building, overhauling, and fueling, and it takes four to five years to build a carrier. (Tr. 88).

Discussion

Modification Petition: Superfluous?

Claimant has argued that the modification petition is superfluous and should be dismissed. (Claimant's Post-Hearing Brief, filed Sept. 29, 1999, at p. 15). The Benefits Review Board will ordinarily dismiss an appeal and remand for consideration of a pending modification petition, with the right to have the appeal reinstated, in accordance with 20 C.F.R. § 802.301. However, the Board chose not to do so in the instant case, for reasons not apparent from the file before me (which came to me disorganized and incomplete.) While I question the advisability of having parallel proceedings pending before the Board and the district director, I find no basis for remanding the modification petition to the district director as the petition was properly initiated before the district director and referred for a hearing in accordance with accepted practice. ***See generally*** 20 C.F.R. § 702.373. Accordingly, I will consider the Employer's modification request under section 22 of the Act, 33 U.S.C. § 922 (allowing for termination, continuance, reinstatement, increase or

decrease in compensation “on the ground of a change in conditions or because of a mistake in a determination of fact.”) In doing so, I agree with Claimant that there is an overlap of issues with the pending remand from the Board.

Disability Benefits and Loss of Wage Earning Capacity: General

Total disability benefits (both temporary and permanent) are payable in the amount of 2/3 ("66 2/3 per centum") of a claimant's average weekly wage during the continuance of the disability. 33 U.S.C. § 908(a), (b). The claimant is entitled to total disability benefits from the onset of such disability until permanent partial disability benefits, if any, are payable.[19]

An award for permanent partial disability (for a non-scheduled disability) is based on the difference between the pre-injury average weekly wage and the post-injury wage-earning capacity. 33 U.S.C. § 908(c)(21). Under section 8(c)(21) of the Act, for cases not covered by the schedule, "the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." ***Id.*** Thus, Claimant's loss of wage earning capacity is calculated by taking the difference between his current wage earning capacity and his pre-injury average weekly wage. Section 8(h) of the Act provides:

> (h) The wage-earning capacity of an injured employee in cases of partial disability [not covered by the schedule] . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the [adjudicator] . . . may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h). Thus, in cases where an employee has actual earnings, the wages which the new job would have paid at the time of claimant's injury are compared to the wages the claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. ***Cook v. Seattle Stevedoring Co.***, 21 BRBS 4, 6 (1988). The same approach has been used when suitable alternative employment has been established. ***See Quan v. Marine Power & Equipment Co.,*** 30 BRBS 124 (1996). However, where actual earnings do not fairly and reasonably represent a claimant's wage-

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[19] Disability is deemed to be temporary until maximum medical improvement (MMI) is achieved, at which point disability is permanent. Total disability becomes partial on the earliest date that the employer establishes the availability of suitable alternate employment (not the date of maximum medical improvement.) ***Rinaldi v. General Dynamics Corp.,*** 25 BRBS 128, 131 (1991).

earning capacity, the adjudicator may fix such wage-earning capacity as shall be reasonable. ***See Devillier v. National Steel & Shipbuilding Co.***, 10 BRBS 649 (1979) (listing several factors to consider, including whether Claimant must expend more time, effort, or expertise to earn pre-injury wages and employee's earning power in the open market).

After considering this case in its entirety, and particularly Claimant's recent testimony before me, I find that I made a mistake in determination of fact in finding that the Claimant's actual post-injury wages do **not** fairly and reasonably represent his wage-earning capacity. In fact, much of the confusion surrounding the four separate decisions issued in the instant case has arisen from a reliance upon the mistaken assumption that the Claimant's actual wages are not representative of his wage-earning capacity, combined with an attempt to use those same wages as a means for calculating the wage-earning capacity, based upon the Claimant's subjective basis for his actions. Such flawed, circular reasoning has led to irrational results. I now find that the Claimant's actual earnings with the Employer in more than a decade following his injury "fairly and reasonably represent his wage-earning capacity" in accordance with 33 U.S.C. § 908(h).[20]

Judge Lawrence had initially found (in his June 24, 1987 decision) that the Claimant's actual wages did not reflect his actual earning capacity, because of his "extraordinary effort" due to the shift differential (even though Claimant always had worked the second shift when possible). Following the remand from the Board, Judge Lawrence initially found the wages to be representative but reversed that finding on reconsideration (in his February 3, 1994 decision) noting that claimant had to work more overtime to maintain his pre-injury wage level and no longer had the benefit of the second shift differential. Similarly, I found that the Claimant's wages did not accurately reflect his wage earning capacity because he no longer received the second shift differential and had to work more overtime after his injury than he did prior to his injury. However, Claimant eventually returned to the second, and then equally well paying third, shift, and his overtime has fluctuated in the years following the accident, as reflected by the tables below, but did not average more than two hours more weekly after the accident (and, possibly, than less one hour more if 1985 and 1986 are excluded).[21]

In fact, the Claimant's testimony, considered along with the other evidence of record, shows that he has **always** been a hard worker and has **always** sought to

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[20] In making these statements, I am not disputing the fact that the Claimant's actual wages in 1986 (when mandatory overtime was required and Claimant worked far more overtime than he worked in any other year) do not, taken alone, fairly and accurately represent his post accident wage earning capacity.

[21] See pages 19 to 21, ***infra***.

maximize his earnings to the extent practicable, although his motivation for doing so may have changed over time. In this regard, Claimant has **always** worked overtime when available (although the number of hours may have increased after the accident, particularly during 1986), he has **always** worked the second (or third) shift when possible to obtain the wage shift differential, and he has **always** performed high quality work, with a view toward merit pay increases. Although Claimant's base hourly wage rate is somewhat lower at the instant time than it was before the injury, the record does not show that the Claimant has expended more time, effort, or expertise following the injury to earn comparable wages.[22] In fact, he has not earned comparable wages except for 1986, when inflation is taken into account. There is no indication that he has made extraordinary efforts following the accident, as he has always been a diligent, industrious, even zealous worker. It appears that the only time that Claimant's post-injury efforts to maximize his income have resulted in any apparent hazard to his health or have caused him additional pain was during the period of mandatory overtime in 1986, most of which overtime was **not** motivated by Claimant's own need for additional funds, as it was involuntary. Thus, I find that any calculation of Claimant's wage earning capacity should depend upon his **actual** earning history. This finding is consistent with the thrust of the Board's decision, because the Board, while giving lip service to the finding that the Claimant's actual wages were not reflective of his true wage earning capacity, nevertheless required that they be used as a measure of it.

Consideration of Remanded Issues

Briefly, I note that my finding that Claimant's actual wages are representative of his wage earning capacity resolves some of the issues remanded by the Board and essentially supersedes the Board's decision. [23] However, as that issue was not remanded by the Board and as the Claimant has objected to consideration of the modification petition, I will first address the issues in accordance with the remand by the Board. In doing so, I will make some preliminary comments before calculating the Claimant's wage earning capacity.

First, on the issue of overtime, I find that the Claimant's **actual** overtime earnings over more than a decade following the Claimant's injury provide a reliable basis for estimating future overtime, and I therefore no longer find that overtime is too speculative to

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[22] Claimant has argued that overtime has been less available to him post-injury while arguing at the same time that he was required to (and did) work more overtime post-injury to maintain his pre-injury wages. In fact, the record (and particularly Mr. Routen's testimony) shows that the Claimant may well have had **more** overtime opportunities in his current position.

[23] My finding that Claimant's actual wages are representative of his wage earning capacity would result in a different calculation of wage earning capacity than the Board's decision has contemplated, as set forth below.

be included. The period of time involved of approximately 15 years would cover two or three cycles, according to witness Bill Routen, so the sizable fluctuations from year to year would even out to a certain extent over time. The **actual** hours of overtime worked should be used for those years for which we have actual data, as there is little rationale for using year-specific information for two of the factors to be considered (shift differential and merit increases) and not for the third.[24]

On the issue of whether and to what extent Claimant's post-injury overtime was necessary in order for Claimant to earn the same wages as he earned prior to the hearing, I find no correlation with the hours worked and any desire to maintain earnings. In fact, as the charts set forth below (pp. 19-20, 26) indicate, the Claimant's earnings from year to year were erratic, as was the amount of overtime he performed. As I have noted above, the Claimant consistently sought and performed overtime work, both before and after his injury, and all that can be said is that he worked more overtime on the average following the accident than he did before.[25] Although Claimant has testified that he worked overtime after the injury "[t]o make up the difference of the money that I lost" (Tr. 54), the records do not support his statement. The Claimant's reported income does not show that he worked a set amount of overtime to maintain wages, and it is undisputed that he declined overtime on occasion following his injury. It is also undisputed that in 1986 he earned more than he had before his injury due to overtime, some of which was mandatory and some of which was voluntary. In fact, when comparing his current basis for working overtime with his past basis, Claimant has stated that he originally worked overtime to support his family (consisting of himself, a nonworking wife and four children), to try to have a nice car, and to try to buy a home (Tr. 54) while now, he is divorced and he works overtime to pay his bills. (Tr. 55). I find this to be a distinction without a meaningful difference. The record as a whole shows that the amount of overtime that Claimant worked was more based upon its availability than any other factor.

I also note that the Claimant has failed to establish that there are fewer overtime opportunities available to him in his post-injury job. In this regard, Claimant's supervisor Bill Routen has testified that, although overtime was generally not as available at the time of the hearing before me as it was when Claimant worked as a toolkeeper, Claimant is

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[24] The Board's decision does not provide any guidance as to whether the varying wage earning "capacities" (which it has mandated to be adjusted each time Claimant received a merit increase or an involuntary shift change) should also reflect varying amounts of available overtime or whether an average overtime value should be calculated and then plugged in to the varying "capacities," as Employer has suggested. Claimant has not addressed this issue.

[25] It is not possible to determine the exact amount of overtime included in the stipulated average weekly wage, as discussed elsewhere in this decision. However, it is clear that some overtime was included in that figure, contrary to Claimant's argument to the contrary (Claimant's Post-Hearing Brief at 13 to 14). See, ***e.g.***, footnotes 9, 10, 16, and 27 and accompanying text.

probably getting as much overtime now as anyone, including the toolkeepers. Mr. Routen would be in a better position to assess the availability of overtime as he is a manager and the one who assigns overtime work in Claimant's shop. Claimant's stated rationale for greater availability of overtime as a toolkeeper because the function is centralized is no longer operative, as Mr. Routen has indicated that the drawing clerks have been centralized since 1995. I accept Mr. Routen's testimony on the issue. Thus, I will include overtime based upon the actual amounts earned for the post-injury period and will attempt to extrapolate future overtime earnings based upon this data to come up with a prospective amount of overtime to be included.

Second, on the issue of whether and when the shift differential should be included, the Board has essentially directed me to include the shift differential during those periods of time in which it was actually paid, unless the transfer to the first shift in March 1992 was voluntary. I find that Claimant's transfer to the first shift was **not** voluntary, based upon his undisputed testimony, and I note that he has always opted for the higher paying shifts when available. Prospectively, I will include the shift differential as he has consistently earned it since May 9, 1996.

Third, turning to the merit increases, under the Board's decision, they must be included during the periods of time paid and prospectively, adjusted back to the time of injury. I reject Claimant's suggestion that any extraordinary efforts were involved with respect to either merit increase. Claimant merely continued to perform at the same high level as he did prior to his injury.

Finally, as the Board has indicated, the award of permanent partial disability benefits should be adjusted for inflation and the wage earning capacity should be adjusted back using National Average Weekly Wage tables if (as here) there is no vocational or other evidence on the issue. This adjustment should be made for the entire amount of Claimant's post-earning wages, not just for the merit increases. The Act requires a comparison of average weekly wages (defined as wages **at the time of the injury**) with wage earning capacity thereafter. 33 U.S.C. §§ 902(12), 908(c)(21). ***See Walker v. WMATA***, 793 F.2d 319, 323 (D.C. Cir. 1986), ***cert. denied***, 479 U.S. 1094 (1987). Thus, the Claimant's wage earning capacity, as calculated based upon the above, should be adjusted back to the time of the injury and compared with the Claimant's wages at that time to calculate a loss of wage earning capacity.

Remand: Calculation of Loss of Wage Earning Capacity

As noted above, I have found that the Claimant's actual earnings are representative of his wage earning capacity, but I am nevertheless first calculating the Claimant's wage earning capacity in accordance with the Board's remand decision, in view of the litigiousness of the parties and the possibility of further proceedings. Although conceptually I have a problem with varying wage earning **capacities** – a misgiving which

is apparently shared by some of the Circuit Courts (***see, e.g., White v. Bath Iron Works Corp.***, 812 F.2d 33 (1st Cir. 1987); [26] ***Walker, supra***) – I must follow the Board's mandate. The Board stated:

> . . . While the shift differential was clearly properly included in determining claimant's **post-injury wage-earning capacity during the period from July 22, 1985 until March 1992**, when claimant was actually working the second shift, in March 1992, claimant was again transferred back to the first shift. . . . Judge Wood's finding that the shift differential is properly included in the determination of **claimant's post-injury wage-earning capacity is affirmed for the period from July 1985 to March 1992, but is reversed for the period between May 13, 1985 and July 22, 1985**, as claimant did not have the capacity to earn the shift differential while working on the first shift. [Footnote omitted.] With regard to the period **after claimant's return to the first shift in March 1992**, we vacate Judge Wood's determination that the shift differential was properly included in **claimant's post-injury wage-earning capacity** and remand the case for consideration of the reason for claimant's transfer. If, on remand, she determines that transfer back to the first shift was voluntary, she should reinstate her prior determination that the shift differential was included in **claimant's wage-earning capacity for this period**, as theloss of the shift differential would b
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> . . . Claimant correctly asserts . . . that as he did not receive the second merit pay increase until December 17, 1990, Judge Wood erred in including this increase in his **post-injury wage-earning capacity prior to that date** . . . [Emphasis added].

(EX 31 at 6 to 7). In view of the Board's ruling, I will calculate separate wage earning "capacities" specific to each pertinent time period.

As noted above, the parties stipulated that Claimant's average weekly wage for the injury of January 1983 was $435.72, which yields a compensation rate of $290.48 per week. As Claimant's regular rate of pay was $9.53 per hour,[27] Judge Lawrence calculated that he had regular pay of $381.20 per week and overtime pay of $54.52 per week, and he

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[26] "The question is how much claimant should be reimbursed for this [wage] loss, it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." ***White***, 812 F.2d at 34.

[27] See footnotes 10 and 16 above. Claimant has argued that the base rate should be increased to include the shift differential, which would bring the pre-injury hourly wage rate to $10.00. This would mean that the average weekly wage included $35.72 in overtime, or 2.38 hours of overtime based upon time and a half (or 2.23 hours, if 1.6 times basic pay is used).

calculated the weekly overtime hours as 3.8 based upon a presumed overtime rate of time and one half. (EX 29).

Overtime: Computer summary records submitted following the first hearing and at the time of the hearing before me reflect the following overtime by the Claimant pre-injury and during the year of injury:[28]

Year	Wage Rate	Overtime Earnings	Overtime Hours
1977		$ 444.48	48.0
1978	$6.61 (eff. 4/78), 7.08	2,450.16	223.8
1979	$7.08	3,673.54	323.0
1980	$7.08, 8.08	1,902.16	160.0
1981	$8.63 (eff. 8/4/81)	815.28	64.0
1982	$8.63, 8.73, 9.53	3,453.12	240.0
1983	$9.53, 9.63, 10.50	228.72	16.0

The computer records also show Claimant worked the following overtime during the years following his injury:

Year	Base Wage Rate	Overtime Earnings	Overtime Hours
1984	$10.50 [29]		0.0
1985	$10.50, 11.24, 8.46	4,204.87	326.0
1986	$8.46, 9.05, 9.32	12,048.53	843.7
1987	$9.32	2,431.38	174.0
1988	$9.32	6,421.54	418.4
1989	$9.32	3,608.77	249.8
1990	$9.32, 9.60, 9.94	1,230.41	86.0
1991	$9.94, 9.96, 10.46	726.04	47.0
1992	$10.46, 10.88	913.89	57.0
1993	$10.88, 11.42	692.88	42.4
1994	$11.42	5,821.38	307.5
1995	$11.42	6,419.80	321.5

[28] In arguing that the stipulated pre-injury average weekly wage did not include overtime (see Claimant's Brief at pages 12 to 14), Claimant has not addressed these records, which also appear in the exhibits that he submitted. (CX 4,5).

[29] Claimant's wage rate was maintained for the first two years following the injury. Claimant was determined to have reached maximum medical improvement (MMI) on May 31, 1984. (EX 26).

Year	Base Wage Rate	Overtime Earnings	Overtime Hours
1996	$11.42[30]	3,351.80	173.2
1997	$11.42	5,899.57	298.3
1998	$11.42	6,095.44	313.0

(EX 15, 17, 24, 25, 43, 44). Claimant was not transferred to his drawing clerk position until May 1985, and he thus worked in that capacity for less than 2/3 of the year. Claimant only worked for 3/4 of 1993 and 3/4 of 1996, due to a heart problem and accidents, respectively. (Tr. 66-68). The above translates to an average of 3.39 hours per week overtime from 1977 to 1982, as compared to the 3.8 hours assumed by Judge Lawrence to be included in the stipulated pre-injury average weekly wage. Taking the average of the overtime hours for the 14 years from 1985 through 1998, Claimant's average weekly overtime amounted to 5.02 hours. Taking 1987 through 1998 (because the 1986 results are aberrant and Claimant only worked part of 1985 as a drawing clerk), the average weekly overtime post-hearing was 3.99 hours.

Employer suggests that I use an average yearly overtime amount of 5.8 hours. In coming up with this amount, Employer has argued that instead of considering the actual overtime wages as compared with the number of weeks in a year, I should add the amounts of overtime Claimant worked yearly and divide by the amount of time Claimant actually worked, as adjusted for strikes, accidents, sick leave, vacation time, etc. (which would result in a higher average yearly rate). These types of absences, except for the time off due to serious accidents, strikes, and catastrophic illnesses (which only impact 1993, 1996 and 1999), are not out of the ordinary and would presumably affect the amount of overtime Claimant would be likely to work in the future. To the extent supported by actual data, I will consider Employer's arguments on the issue of Claimant's actual earnings during the periods of time in question.[31] However, with respect to projected wage earning capacity, it would be absurd for me to make calculations based upon the assumption that Claimant would (or should) never be sick or take a vacation in the future. With respect to the strike (Tr. 55), it occurred at the time of the hearing in 1999, and I have decided not to include 1999 in my computations anyway, as complete records for that year were not submitted. In coming up with a prospective figure, I have also decided to exclude 1985, because Claimant only worked as a drawing clerk for part of the year, and to exclude

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[30] The basic pay rate of $11.42 per hour had been amended to include the night shift differential of $.47 more per hour (or $11.89 total) by May 9, 1996. (EX 39).

[31] To a certain extent, Employer has sought to provide its own interpretation of printouts, which are not self explanatory (EX 40). Without a witness or supporting documentation that provides an explanation, or a stipulation between the parties, I cannot accept the representations of Employer's counsel, which do not constitute evidence. See footnote 38.

1986, as the overtime included for that year is aberrant. With respect to 1993 and 1996, I agree that the overtime reflected for those years should be adjusted due to his extended absences due to a heart problem in 1993 and automobile and ladder accidents in 1996 (for approximately one quarter of each of those years), based upon the Claimant's testimony.[32] This would result in overtime hours of 56.5 for 1993 and 230.9 for 1996. Replacing those values for the ones listed above, the average weekly overtime for the 12-year period from 1987 until 1998 would be 4.26 hours, and I find that to be a reasonable estimate of the amount of overtime to be included in wage earning capacity prospectively.

Employer argues that overtime is now payable at either one and one half (1.5) or two (2.0) times the Claimant's base rate of pay (as discussed by witness Routen), and that the overtime should be calculated based upon the average between the two, or 1.75 times the base wage rate. While comparison for different years is complicated by varying wage rates, I note that looking at the pre-injury wages for 1979, overtime was only 1.6 times base pay, not taking into consideration the wage differential. The wages for 1987 through 1989 produce similar results. However, a spot check of recent years shows that, even for those years in which the Claimant was not earning the shift differential, his overtime pay amounted to approximately 1.7 times his base rate.[33] The dynamics of the overtime available has changed somewhat due to the greater prevalence of container ships, as witness Bill Routen testified (as discussed above). Accordingly, while I would otherwise find the approach suggested by the Employer on this issue to be reasonable for future years, in view of the available data, overtime will be calculated based upon 1.7 times base pay beginning at the time of his transfer in March 1992. However, prior to March 1992, I find that 1.6 times base pay would be more accurate.

Shift Differential. The Claimant has been consistently earning the $0.47 shift differential (for the second or third shift) since May 9, 1996, and it should be included in his wage earning capacity (reduced to its actual value at the time of the injury, when it was also $0.47.) In fact, the Claimant worked the higher paying second shift prior to his injury and has always sought to work on one of the two higher paying shifts. The Claimant's actual experience for the time period preceding May 1996 will be taken into consideration. Specifically, Claimant lost the shift differential when he was assigned to his position as drawing clerk in May 1985, but regained it when he was able to switch with a coworker in July 1985, and he kept it until his involuntary transfer to the first shift in March 1992. For the pertinent periods:

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[32] The recorded overtime hours for each of the years 1993 and 1996 (which reflect overtime hours representative of only three quarters of a year) should be adjusted by adding one third of those recorded values (1/3 of 3/4, or 1/4) to reflect the additional quarter year.

[33] Looking at 1994 and 1995, Claimant earned an average of $19.46 per hour for overtime, which is 1.70 times his basic rate of pay of $11.42 during those years.

May 13, 1985 to July 21, 1985: No wage differential.

July 22, 1985 to March 1992: Received wage differential.

March 1992 to May 8, 1996: No wage differential.

May 9, 1996 to time of hearing: Received wage differential.

Merit Increases. The Claimant is now receiving two merit increases, one of which he earned in 1986 (a stipulated adjusted increase of $0.21 per hour, based upon an actual merit increase of $0.27, from $9.05 to 9.32, effective October 20, 1986) and one of which he earned in 1990 (an actual merit increase of $.34,[34] from $9.60 to $9.94, effective December 17, 1990). (EX 44). Both will be included in his wage earning capacity prospectively, reduced to their value at the time of the injury. However, they will not be considered in calculating lost earnings for the periods of time prior to their award, as the Board has mandated.[35] As Employer has indicated (Employer's Brief at p. 13), the $0.34 in December 1990 should be adjusted to reflect the percentage increase in the National Average Weekly Wage from January 1983 to December 1990 ($341.07 for FY 1991 as compared with $262.35 for FY 1983, or 30 percent).[36] The percentage increase of 30% would result in a merit raise of $0.24 per hour,[37] as adjusted back to the date of the injury.

Calculation of Wage Earning Capacity on Remand under Board's Decision. Based upon the above, the Claimant's wage earning capacity for each pertinent period – including actual overtime, the wage shift differential if payable, and the merit increases if applicable (beginning with his transfer to drawing clerk on May 13, 1985) – follows:

May 13, 1985 to July 22, 1985: Initially, Claimant did not receive the shift

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[34] Judge Lawrence incorrectly listed this increase as $0.40 and the Board and I also misstated the amount. However, the amount is clearly $0.34 according to Employer's Exhibit 44, that was previously Remand Exhibit 1, cited by Judge Lawrence.

[35] See my discussion at pages 17 to 18 above.

[36] Although Employer has used 29.7% (Employer's Brief at 13), that figure is incorrect and appears to be based upon rounding of values before the computations are made and/or arithmetic errors. The actual percentage increase is 30%. Claimant has not done any calculations in his brief.

[37] Although Employer has calculated $0.24 as the adjusted value of the second merit increase, by incorrectly taking 70.3% of $0.34 (Employer's Brief at 13), the actual value is $0.26. Where x is the value of the merit increase back in 1983, and x increased by the NAWW (30 per cent) equals the merit value in 1990 ($0.34), then x added to 30 per cent of x would equal $0.34. Thus, x = $0.34/(100% + 30%) = $0.34/1.3 = $0.26.

differential and had an adjusted basic rate of pay of $7.16 per hour. Based upon 40 hours, he received $286.40 base pay. Although an exact breakdown was not provided, Claimant averaged 5.2 hours of overtime weekly in 1985. However, he received his usual wages for the first two years after his injury, ending on May 13, 1985. Employer has calculated that Claimant actually worked an average of 10.5 hours weekly overtime in 1985 for the weeks he actually worked (based upon consideration of the 14 days of vacation taken by Claimant and the fact that there were approximately 33 weeks left in the year after Claimant became a drawing clerk, meaning that the overtime that he worked was over a 31-week period.)[38] Although I agree that the computation should begin in May 1985, as the calculation is based upon average overtime, there is no need to deduct the sick leave period. The result is 9.9 hours of overtime. Adding 1.6 times (***see*** page 21) his adjusted hourly wage as the overtime rate ($11.46), he received an additional adjusted amount of $113.45 weekly for overtime, resulting in a total of $399.85 for this period. Based upon the stipulated average weekly wage of $435.72, the loss of wage earning capacity for this period of time was $35.87 weekly.

July 23, 1985 to October 19, 1986: During this period of time, Claimant received the shift differential, bringing his hourly wage, adjusted back to the date of the injury, to $7.63 per hour. Based upon 40 hours, he received $305.20 base pay. As noted above, Claimant averaged 5.2 hours of overtime weekly in 1985, although it was 9.9 hours for the period of time worked, and his average overtime in 1986 increased to 16.2 hours weekly. Employer has calculated that Claimant worked for 50 weeks in 1986, taking into consideration his vacation and sick leave, bringing the average weekly overtime for the time worked for 1986 to 16.9. I will not deduct the two weeks of leave in calculating average weekly overtime. Using an overtime rate of 1.6 times the hourly rate ($12.21), the Claimant earned an average of $120.87 in overtime in 1985 (for the period of time that he was a drawing clerk) and $197.80 in overtime in 1986, bringing the wages for July 23, 1985 until December 31, 1985 to $426.07 weekly and the wages from January 1, 1986 to October 19, 1986 to $503.00. As compared with the stipulated average weekly wage of $435.72, the loss of wages for the latter part of 1985 was $9.65 weekly and there was no loss of wages in 1986.

October 20, 1986 to December 16, 1990: During this period of time, Claimant remained on the second shift, and therefore received the shift differential, and he also

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[38] In making the calculations, Employer has used average overtime for the entire period. Because annual data is available, I am using average overtime amounts calculated for each year in which overtime data is available and have taken the period average for use prospectively. I have been unable to use the daily records provided because they do not appear to be complete based upon a comparison with the printouts and therefore require some explanation, which has not been provided. Compare, ***e.g.***, CX 2 with CX 4 for the year 1989. There is no discrepancy for 1983, the year for which an explanation was provided by witness Thure Larson, Employer's personnel supervisor, at the last hearing. (CX 16 at 104-105).

received the first merit increase (which, as the Employer has noted, was $.21 per hour adjusted back to the time of the accident according to the stipulation of the parties.) This resulted in a basic hourly wage of $7.84, for basic pay of $313.60 weekly, plus overtime of 1.6 times that hourly rate, or $12.54 per hour for overtime. Based upon 16.2 hours of overtime in 1986, this would amount to overtime pay of $203.14 weekly, for total pay of $516.74 in 1986 and no loss of wage earning capacity for that year as compared with the stipulated average weekly wage of $435.72. The comparable wage earning capacity figure for 1987 would be $363.80 (based upon four hours of overtime), with a loss of wage earning capacity of $71.92; for 1988, it would be $413.92 (based upon eight hours of overtime), with a loss of wage earning capacity of $21.80; for 1989, it would be $373.79 (based upon 4.8 hours of overtime), with a loss of wage earning capacity of $61.93; and for 1990 would be $334.29 (based upon 1.65 hours of overtime), with a loss of wage earning capacity of $79.63.

December 17, 1990 to March 1992: Claimant remained on the second shift until March 1992, and he received a merit increase of $0.34 hourly (not $0.40 as incorrectly stated by Judge Lawrence, the Board, and the undersigned), which must be adjusted downward (to $0.26) based upon the National Average Weekly Wage, as discussed above.[39] This would result in an average hourly wage of $8.10 per hour, or a base rate of $324.00, with a corresponding overtime rate of $12.96 (based upon 1.6 times the average hourly rate). The wage earning capacity for 1990 would be $345.38 (based upon 1.65 hours of overtime), with a loss of wage earning capacity of $90.34 (as compared with the stipulated average weekly wage of $435.72); for 1991 it would be $335.66 (based upon .9 hours of overtime), with a loss of wage earning capacity of $100.06; for 1992 it would be $338.13 (based upon 1.09 hours of overtime) for a loss of wage earning capacity of $97.59.

March 1992 to May 8, 1996: Claimant was transferred back to the first shift in March 1992 and no longer received the shift differential of $0.47 (which is also $0.47 as adjusted to 1985, as it has not changed), thus reducing his adjusted average hourly wage from $8.10 to $7.63 and the base weekly rate to $305.20. (This includes the adjusted basic rate of $7.16 per hour plus the adjusted merit increases of $0.26 and $0.21). The corresponding overtime rate would be $12.97, based upon 1.7 times the basic rate, as discussed above. Thus, the wage earning capacity for 1992 would be $319.33 (based upon 1.09 hours of overtime) with a loss of wage earning capacity of $116.39. For 1993, after excluding the 90 days (12 weeks) Claimant was out, the average weekly overtime would be 1.06 hours, resulting in a wage earning capacity of $318.95 and a loss of wage earning capacity of $116.77. For 1994, the wage earning capacity would be $381.72 (based upon 5.9 hours of overtime) and the loss of wage earning capacity would be $54.00. For 1995, the wage earning capacity would be $385.61 (based upon 6.2 hours of

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[39] See footnotes 36 and 37 on page 22 and accompanying text.

overtime) and the loss of wage earning capacity would be $50.11. For 1996, after excluding the 90 days (12 weeks) that Claimant was out, the average weekly overtime would be 4.3 hours, resulting in a wage earning capacity of $360.97 and a loss of wage earning capacity of $74.75.

May 9, 1996 to Present: Claimant was transferred back to the second shift by May 9, 1996, and he continued to be employed at either of the two higher paying shifts from that date until the time of the hearing. This would result in an average hourly wage of $8.10 per hour, or a base rate of $324.00, with a corresponding overtime rate of $13.77 (based upon 1.7 times the average hourly rate). For 1996, after excluding the 90 days (12 weeks) that year that Claimant was out, the average weekly overtime would be 4.3 hours, resulting in a wage earning capacity of $364.41 and a loss of wage earning capacity of $71.31. For 1997, the wage earning capacity would be $401.11 (based upon overtime of 5.6 hours), with a loss of wage earning capacity of $34.61; and for 1998, the wage earning capacity would be $406.62 (based upon overtime of 6.0 hours), for a loss of wage earning capacity of $29.10.

Prospectively – that is, for 1999 and thereafter – I will use an average overtime figure of 4.26 hours, as calculated above (***see*** pp.19-21), along with an average hourly wage of $8.10 per hour (an adjusted figure which includes the shift differential and both merit increases), or a base rate of $324.00, with a corresponding overtime rate of $13.77 (based upon 1.7 times the average hourly rate (***see*** p. 21 above). This will result in overtime of $58.66 weekly, a wage earning capacity of $382.66, and a loss of wage earning capacity of $53.06 as of the date of the injury, with a corresponding compensation rate of $35.37, when calculations are done based upon the Board's remand decision.

Modification: Calculation of Loss of Wage Earning Capacity

As noted above, I have found a mistake in fact in the determination that Claimant's actual wages do not accurately reflect his wage earning capacity and that they are, in fact, representative. Unless this finding is overturned or it is determined that there is no jurisdiction over the modification petition, this finding means that the calculations made above, which are premised upon the assumption that the Claimant's actual earnings are not representative of his wage earning capacity, will be replaced by calculations based upon the Claimant's actual earnings.

To calculate loss of wage earning capacity for the pertinent periods of time, the Claimant's actual earnings, including overtime, for each year, as shown on computer printouts, should be adjusted back to the time of injury, using the NAWW (unless actual data is available as to what the same position would have paid at the time of injury). Those earnings can then be compared with the Claimant's average yearly wage (his stipulated average weekly wage of $435.72 multiplied by 52) to determine the wage loss (or loss of wage earning capacity). The Claimant's stipulated average yearly wage was $22,657.44

at the time of his injury. This can be compared with his actual earnings since the time of the accident, as adjusted back to allow for inflation. They are listed below, as adjusted according to the NAWW data, together with his wages for years preceding his injury, for comparison purposes:

Year	Gross Wages	Adjusted Wages (Loss per Week)
1977	$10,699.40	
1978	16,755.09	
1979	19,144.58	
1980 (first injury)	14,775.66	
1981	18,038.99	
1982	22,382.88	
1983 (second injury)	11,450.64	
1984	22,529.28	
1985 (transfer)	24,165.23	21,874.02 ($15.07)[40]
1986	31,264.04	27,559.04 (none)
1987	20,102.60	17,425.22 (100.62)
1988	25,503.31	21,689.55 (18.61)
1989	16,291.26	13,435.22 (177.35)
1990	18,382.80	14,600.61 (154.94)
1991	21,429.78	16,483.72 (118.73)
1992	21,302.32	15,968.52 (128.64)
1993	17,803.66	12,953.91 (186.61)
1994	30,076.32	21,374.84 (24.67)
1995	31,128.78	21,465.16 (22.93)
1996	20,676.54	13,865.58 (169.07)
1997	29,039.84	19,021.30 (69.93)
1998	28,144.65	17,669.97 (95.91)
Average (1985-1998)		$18,241.90 ($84.91/91.65)[41]

[40]Adjustments have been made based upon the National Average Weekly Wage (NAWW) for fiscal years 1983 through 1998, which are: $262.35 (FY 1983), 274.17 ('84), 289.83 ('85), 297.62 ('86), 302.66 ('87), 308.48 ('88), 318.12 ('89), 330.31 ('90), 341.07 ('91), 349.98 ('92), 360.57 ('93), 369.15 ('94), 380.46 ('95), 391.22 ('96), 400.53 ('97), 417.87 ('98). See www.oalj.dol.gov. (link). The NAWW for the year of injury is divided by the NAWW for each pertinent year, and the result is multiplied by the wages for that year, to arrive at wages adjusted for inflation, which are in turn divided by 52 to come up with weekly wage earnings, which are subtracted from the stipulated average weekly wage ($435.72) to come up with an average weekly loss of earnings for that year.

[41] The average loss of wages works out to $84.91 per week, if wages for 1986 are included in averaging the loss of earnings over the period, and $91.65, if the losses for each year

(EX 41,43).

I find that the adjusted amount of $84.91 per week fairly reflects the Claimant's loss of wage earning capacity in 1983 dollars for each year after 1998, and compensation shall be payable at two thirds of that rate, or $56.61 weekly (as compared to a loss of wage earning capacity of $53.06 per week with a corresponding compensation rate of $35.37 under the remand decision; see page 25 above.)

CONCLUSION

In view of the above, I find that the Claimant's actual wages (as set forth above) accurately reflect his wage earning capacity and that he is entitled to compensation for each year listed above based upon 2/3 of the amounts listed parenthetically under "Adjusted Wages (Loss per Week)" in the above table (on the preceding page) and, for each year after 1998, based upon $84.91 weekly as of the time of his injury (with a corresponding compensation rate of $56.61 weekly).

If there are any additional issues that remain (except for the issue of attorney's fees before the Office of Administrative Law Judges) they are referred to the district director for appropriate disposition.

ATTORNEY'S FEES

Although Claimant has not prevailed on most of the issues on remand, Claimant has been awarded some compensation in excess of that which the Employer is willing to pay.[42] Claimant's counsel should submit a revised petition for attorney fees within thirty days for those services performed before the Office of Administrative Law Judges and Employer shall have thirty days to respond.

ORDER

IT IS HEREBY ORDERED THAT the Employer's petition for modification is **GRANTED** to the extent set forth above; and

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(listed parenthetically in the above table) are averaged. The "loss" for 1986 is actually a gain of $94.26, based upon earnings of $529.98 as compared with the stipulated average weekly wage of $435.72. When the loss for 1986 is included as $0.0, the average loss is $91.65. Based upon my decision to use actual earnings as representative of the Claimant's true wage earning potential, the average of $84.91 will be utilized.

[42] For example, see Employer's Brief at p. 14, suggesting compensation rates of $51.10, $35.38, and $28.36 (for the periods beginning in May 13, 1985, July 23, 1985, and October 20, 1986, respectively), and $20.34 from December 17, 1990 and continuing.

IT IS FURTHER ORDERED THAT the Claimant's award of permanent partial disability benefits is hereby **MODIFIED** as set forth herein, and Claimant shall be entitled to compensation based upon 2/3 of his loss in wage earning capacity for the years 1985 through 1998 in the amounts listed under "Adjusted Wages (Loss per Week)" on the table on page 26 above, and for each year after 1998 based upon a loss

of wage earning capacity of $84.91 weekly (with a corresponding compensation rate of $56.61) as adjusted to the time of the Claimant's 1983 accident; and

IT IS FURTHER ORDERED that any remaining issues, except for the issue of attorney's fees for services performed before the Office of Administrative Law Judges, are referred to the district director for informal disposition or other appropriate action.

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PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.

Date: October 26, 2000 (As Revised)